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IN THE

UNITED STATES SUPREME COURT

October Term, 1928.

No. [redacted] 22

CHARLES WARNER COMPANY,
Petitioner,

v.

INDEPENDENT PIER COMPANY,
Respondent.

No. 624. 23

CHARLES WARNER COMPANY,
Petitioner,

v.

Steamship "GULFTRADE," Whereof GULF REFINING COMPANY is Claimant,

On Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Brief for Independent Pier Co., Respondent

HOWARD M. LONG,
Proctor for Independent Pier Co.

I. F. Huntzinger Co., Appellate Printers, Camden, N. J.

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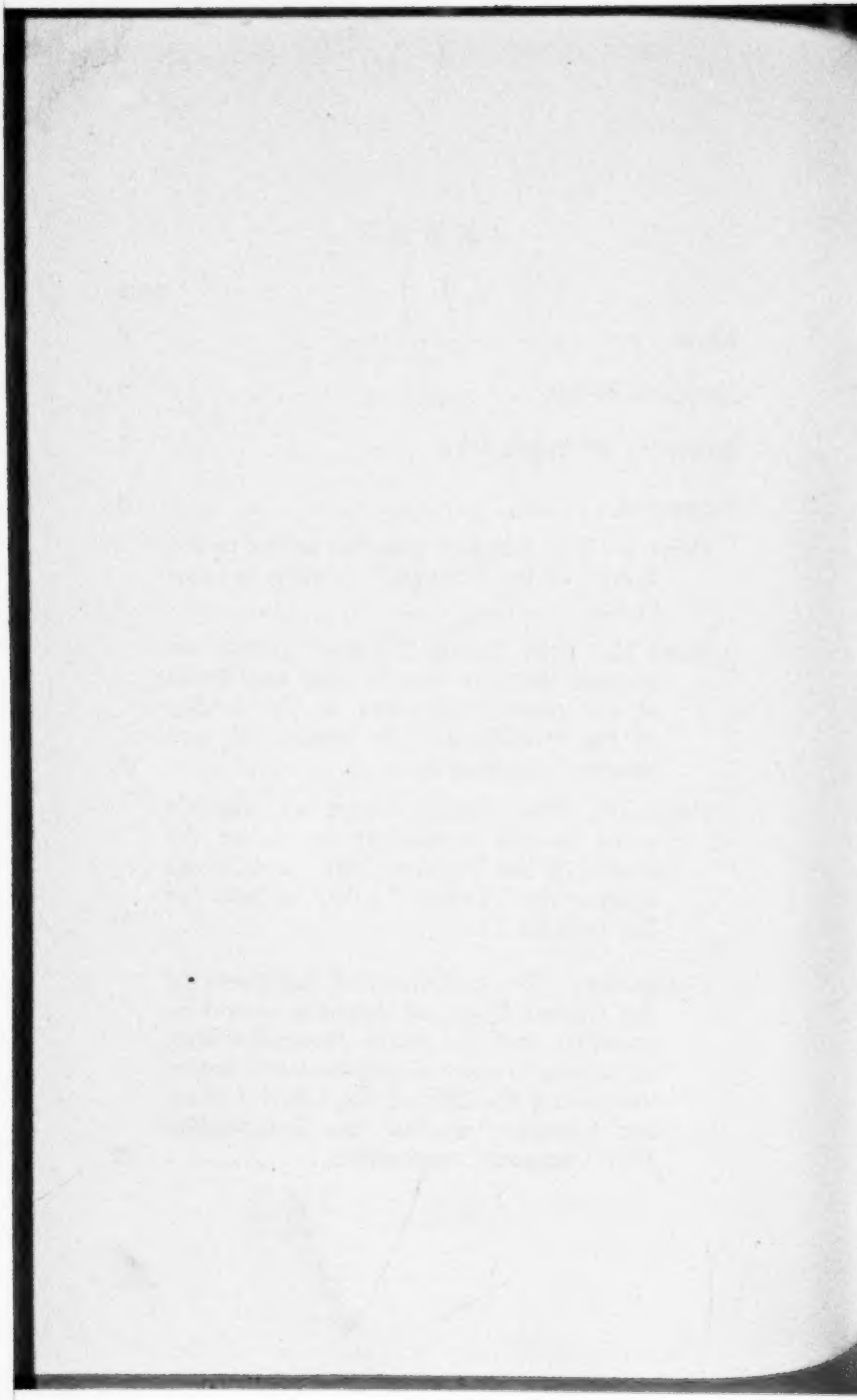

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1928.

No. 623.
CHARLES WARNER COMPANY,
Petitioner,
v.
INDEPENDENT PIER COMPANY,
Respondent.

No. 624.
CHARLES WARNER COMPANY,
Petitioner,
v.
STEAMSHIP "GULFTRADE," WHEREOF GULF REFINING COMPANY IS CLAIMANT.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR INDEPENDENT PIER COMPANY, RESPONDENT.

These are writs of certiorari to review a decision of the Circuit Court of Appeals for the Third Circuit modifying a decree of the District Court for the Eastern District of Pennsylvania.

The cause of action arose out of a collision which occurred Oct. 1, 1923, at 2 P. M., in the Schuylkill River some distance above the juncture of that river with the Delaware River, between the steamship "GULFTRADE" and a hawser tow of loaded sand scows in tow of the petitioner's steamtug "TAURUS." At the time of the collision the steamer "GULFTRADE," a large tank steamer 429.3 ft. long, 59.2 beam, drawing 26½ to 27 feet was being navigated up the Schuylkill River. The steamtug "TRITON" and "F. A. CHURCHMAN" (the "TRITON" being owned by respondent, Independent Pier Company), were made fast to the port quarter and port bow of the "GULFTRADE" for the purpose of assisting the "GULFTRADE" around the bends of the river located above the point of collision, but the engines of neither tug were in motion until just before the collision. The motive power of the flotilla being furnished by the "GULFTRADE." The master of the tug "TRITON" was on the bridge of the "GULFTRADE" in charge of her navigation.

The libel was filed by the petitioner, Charles Warner Co., as owner of the sand scows against the S. S. "GULFTRADE" in *rem*, and against the Gulf Refining Company, her owner, in *personam*, and also against the tugs, "TRITON" and "CHURCHMAN", in *rem* and against the Independent Pier Company and Alfred C. Churchman, owners of the tugs, in *personam*, to recover for damages sustained by its lighters as a result of a collision with the "GULFTRADE."

FACTS.

On October 1, 1923, the steamship "GULFTRADE" loaded with a cargo of oil in bulk was proceeding up the Delaware River bound for Girard Point located on the Schuylkill River. The weather was fair, tide flood, light northerly wind. When about off Fort Mifflin, Delaware River the tugs "TRITON" and "F. A. CHURCHMAN" came alongside to assist her to her berth at Girard Point. The "CHURCHMAN" was made fast on the "GULFTRADE'S" port bow and the "TRITON" on her port quarter. Quillen, master of the "TRITON" went on the "GULFTRADE'S" navigating bridge to direct her navigation while Marvil, master of the "CHURCHMAN" also went on the bridge to transmit any orders which Capt. Quillen might give to the tugs. The tug's engines were not in motion until shortly before the collision and the motive power of the "GULFTRADE'S" flotilla was supplied by the engine of the "GULFTRADE." (R. 370-371.)

The tug "TAURUS" owned by the petitioner, Charles Warner Company with petitioner's loaded sand scows Nos. 18, 33, 44, 53 in tow on hawsers astern, was proceeding up the Delaware River ahead of the "GULFTRADE" bound to certain wharves on the Schuylkill River. The tow of the "TAURUS" was made up in two tiers of two scows each, No. 53 port hawser boat, No. 18, starboard hawser boat, No. 44, port boat second tier and No. 33 starboard boat in second tier. The "TAURUS" was 65 ft. in length, the hawser between her and the scows in forward tier 100 feet in length, each of the scows about 120 feet long, so that the length of the

"TAURUS" and tow was in excess of 400 feet (R. 33-34) and her draft was not over 10 feet. (R. 547.)

The "GULFTRADE" was gradually overhauling the "TAURUS" and her tow. When tow was about one-quarter mile from the mouth of the Schuylkill River the "GULFTRADE" blew a signal of one blast which the "TAURUS" immediately answered with a signal of one blast. The "GULFTRADE" was then about half a mile from the mouth of the Schuylkill River. (R. 372.) At this time the engines of the "TRITON" and "CHURCHMAN" were not being operated and the motive power was being furnished by the "GULFTRADE."

When the "TAURUS" was about one-sixteenth of a mile away from the two buoys just inside the mouth of the Schuylkill River, the "GULFTRADE" blew another one blast which the "TAURUS" answered with her signal of one blast (R. 372-373). The "TAURUS" and her tow passed in between the buoys, and were a little one the "GULFTRADE's" port bow.

The "GULFTRADE" came into the Schuylkill River a little to the eastward of the ranges and between these two buoys, having the red buoy on her starboard hand and the black buoy on her port hand.

As the "GULFTRADE" was entering the Schuylkill River she blew a third one blast signal to the "TAURUS" and the "TAURUS" was then about the length of the "GULFTRADE" ahead. This signal was also answered by the "TAURUS" with one blast. Shortly after answering that signal the "TAURUS" seemed to ease off to her port a quarter or half point of the compass, and then shortly afterward sheered with her tow to her starboard some two or three points, bringing the "TAURUS" across the bow of the "GULFTRADE" and pulling the tow of the

"TAURUS" to starboard and bringing the "TAURUS" on the starboard side of the "GULFTRADE" and her starboard head lighter also across the "GULFTRADE'S" bow. This lighter after the collision passed down on the starboard side of the "GULFTRADE" and turned over (R. 373-380 inclusive).

The Court of Appeals found that at least two and probably three one blast passing signals were exchanged between the flotillas (R. 581). The District Court found that the channel of the Schuylkill River had a charted depth at mean low water of about the draft of the "GULFTRADE" and also found that three one-whistle passing signals were exchanged between the flotillas.

The width of the channel of the Schuylkill River at and in the vicinity of the point of collision, for vessels of the depth of the "GULFTRADE" was about 200 feet and the "GULFTRADE" and vessels of her draft were compelled to follow the ranges which were set on the end of League Island shore (R. 422-423). Soundings made by Wilmer, a disinterested witness, showed that for a distance of 1000 feet in the Schuylkill River above the buoys the "TAURUS" and her tow could approach to within 75 feet of the west bank while the "GULFTRADE" could not get closer than 200 feet. These soundings are attached to the record and appear immediately after p. 573 (R. 425-434, inc.).

Immediately after the "TAURUS" and her tow had gone to their starboard, the "GULFTRADE'S" helm was put hardaport, the tugs hardaported under the orders of Quillen and the "GULFTRADE'S" engines, as well as those of the tugs were used in attempting to swing the "GULFTRADE" away from the "TAURUS" and her tow but the collision could not be avoided, and the bluff of the "GULFTRADE'S" port

bow first came into collision with the *starboard side amidships of lighter No.* 33 and lighter No. 18 the starboard hawser lighter came right across the bow of the "GULFTRADE" into collision with the "GULFTRADE's" stem, the tow line parted and the No. 18 drifted down the starboard side of the "GULFTRADE" and capsized some forty to fifty feet from the "GULFTRADE's" starboard side. (R. 234-238; 256, 257, 263, 275, 277; 302, 303, 307, 308, 310 313; 324-327; 377, 408, 415, 417.)

DECISIONS BELOW.

The District Court found that the "TAURUS" and her tow were close to midchannel when their swing into the Schuylkill River was about completed, and that the "TAURUS's" tow swung to eastward athwart the channel and across the "GULFTRADE's" course, but held that those in charge of the "GULFTRADE" were bound to anticipate such a condition, and that the "GULFTRADE's" navigator made a miscalculation and brought about the collision, in that he expected the tow would be out of his way by the time the "GULFTRADE" reached the passing point, and therefore found the "GULFTRADE" and her navigator in fault. It held the Independent Pier Company in *personam* primarily and the "GULFTRADE" secondarily.

The Circuit Court of Appeals agreed with the finding of the District Court as to the presence of the "TAURUS" and her tow in midchannel and that the tail of her tow was still in the channel when the collision occurred and held the "TAURUS" in fault for not keeping her tow in line and for answering

the passing signals of the "GULFTRADE" when her tow was not in a position to let the "GULFTRADE" pass in safety. It found the "TAURUS" in fault for giving three consents to the "GULFTRADE" to come ahead, relying too much on the "TAURUS's" ability to get her tow out of the channel. It therefore found that both the "TAURUS" and the "GULFTRADE" made a miscalculation and held them both in fault, and decreed against the "TAURUS" and the Independent Pier Company primarily and the 'GULFTRADE" secondarily.

Both Courts found that the "GULFTRADE's" navigation was in charge of Quillen, master of the tug "TRITON" and the servant of the Independent Pier Co.

SUMMARY OF ARGUMENT.

It will be argued.

1. That the collision was due solely to the failure of the "TAURUS" to keep her tow in line.

2. That the tug "TRITON" should not be held liable in *rem* for the negligence of her master who was on the bridge of the "GULFTRADE" in charge of that steamer's navigation.

3. The Circuit Court of Appeals erred in not completely reversing the decree of the District Court, and in not holding the "TAURUS" solely at fault for the collision.

ARGUMENT.

Point I.

The collision was due solely to the failure of the "Taurus" to keep her tow in line.

It is admitted that this is a case of a collision between two vessels, one of which is the overtaken and the other the overtaking vessel and the duties of the respective vessels are clearly set forth in the rules printed, page 11 of the petitioner's brief, and it is therefore admitted that the "TAURUS" being the vessel ahead should not have attempted to cross the bow or crowd upon the course of the "GULFTRADE" which was the passing vessel.

Article 21 of the Pilot Rules provides:

> "Where by one of these rules one of two vessels is to keep out of the way, the other vessel shall keep her course and speed."

In *The Garden City,* 19 Fed. 524, and in the *Dentz,* 29 Fed. 525, it was held where an overtaking vessel has signalled her intention to pass another vessel on her starboard side, and the overtaken vessel has assented to such passing signal, that it is the duty of the overtaken vessel to change her course to port if she has unobstructed sea room on that side so as to give the overtaking vessel more room to pass, if safety requires it. See also *The Menominee,* 197 Fed. 736.

The swing of the "TAURUS'S" bow to the starboard is established not only by the testimony of witnesses from the "GULFTRADE," the "TRITON" and

the "CHURCHMAN" (R. 322-327 inc., 331, 334, 340, 354, 355, 359, 361, 376, 377, 234-238, 256-263 inc., 408-417 inc., 457-473 inc., 483, 484, 524, 424), but it is also testified to by Geddes the master of the "TAURUS" who said:

"Q. As you rounded that buoy, did you make any change in the wheel, when you got your tow past the buoy?

A. After the tow was clear of the buoy, going into the mouth of the Schuylkill the stern barges swung out toward mid-channel. I then ported my wheel for an instant, bearing my tug to the starboard.

Q. What was the purpose of that?

A. The purpose of that was to throw the stern tow to the westerly shore; to pull them in out of the mid-channel.

Q. How long did you keep your wheel to port?

A. About half a minute.

Q. And then, what was your next movement of the wheel?

A. I starboarded my wheel to haul her back on the original course.

Q. Did you receive any further signal from the "GULFTRADE"?

A. I received another prolonged blast of the steam whistle.

Q. Where were you then? Was that before or after you rounded the black buoy?

A. If I remember, it was after the tow had pulled clear of the black buoy.

Q. Did you answer that signal?

A. Yes, sir.

Q. What did you answer that signal with?

A. One prolonged blast of the steam whistle."

Under cross-examination the "TAURUS's" master repeated his testimony as to the change of course of his tug and tow (R. 50-51).

And while under cross-examination by Mr. Dawson, Capt. Geddes said that he was just passing the black buoy when his tow swung out to mid-channel or near midchannel (R. 55) and that the stern of the stern barges in tow swung out near mid-channel (56).

The District Court found that the "TAURUS" and her tow made this swing to starboard and the Court of Appeals agreed with that finding, and said, "*We are satisfied from the proof and the circumstances that the tail of the tow was still in the channel when the collision occurred.*" (R. 580.)

The pilot of the "TAURUS" attempted to minimize the effect of the changes of the helm of his tug and said that these changes were made to counteract the effect on the tow of the flood tide in the Delaware.

The fact remains that the "TAURUS" and her tow after assenting to the passing signals of the "GULFTRADE" and while under the duty to hold her course and speed, failed so to do and swung athwart the channel bringing herself and her tow across the bow of the "GULFTRADE."

This fault on the part of the "TAURUS" and her tow was the sole cause of the collision.

This was a clear violation of Article 21.

In the *Aurora,* 258 Fed. 439 (C. C. A. 2nd C.) the Court held the hawser tow solely liable for failing to keep her tow in line:

> "The cause of the collision, undoubtedly, was the effect of the tide in swinging the tail of the Aurora's tow toward Staten Island, but this swing could not be increased by her porting

the wheel as she passed the Busby. The tow swing so far on the port side that one of the witnesses says he could see the Aurora's stern, and she was sheering a little toward Staten Island—this probably due to her porting the wheel. If the tow was following the sheering tug, the tail of the tow must have swung toward Staten Island, considering the location as given by the Aurora's witnesses of its tow; and considering the space occupied by having four barges abreast, and the fact that the Aurora's tow were light barges, it is quite apparent that the Busby then was several hundred feet off the Staten Island shore and the Aurora crowded her over into this position. * * *

The fault may well be predicated upon the Aurora alone, with such a long tow in tide waters in an uncontrollable state. She was obliged to keep her tow in line, and if she had not sufficient power to do this alone, it was incumbent upon her to employ helpers. The Busby went as close to the Staten Island shore as safety would permit, and we are of the opinion that she should be exonerated from fault." (p. 441.)

See also, *The Wrestler,* 232 Fed. 448 (C. C. A. 2nd C.), where the tug with a hawser tow was held solely at fault on this account.

The duty of the "TAURUS" to keep her tow in line is clearly set forth in the opinion of Judge Hand, speaking for the Circuit Court of Appeals, 2nd Circuit, in the case of *The Madison,* 250 Fed. 850, who held a tug in fault for allowing her tow to swing out of line while navigating in the East River. Judge Hand said that while the East River is not a nar-

row channel, the obligation to keep tows in line was recognized in the case of the *Wrestler,* 232 Fed. 448, and if the tows did not have sufficient power to do this alone they must employ helpers.

The argument made on behalf of the petitioner in its brief, pages 11 to 15 inclusive, that the "GULFTRADE" as the overtaking vessel was required to keep out of the way of the "TAURUS" and her tow, without recognizing that it was also the correlative duty of the "TAURUS" and her tow to hold their course and speed, and not to allow themselves to swing out of line, is unsound in law and in common sense.

The Circuit Court of Appeals held the "TAURUS" in fault for assenting to the one whistle passing signals of the "GULFTRADE" because it found that the "TAURUS" and her tow, due to a swing of the tow to mid-channel, was not in a position to let the "GULFTRADE" pass in safety.

The petitioner attempts in its brief, pages 11 to 22, to show error in the Court of Appeals in making such a finding, and argues that it was the duty of the "GULFTRADE" to insure a safe passing of the two flotillas.

One of the authorities upon which the petitioner bases his argument is the opinion of *Judge Waddill in The City of Baltimore,* 282 Fed. 490, quoted page 13 of petitioner's brief, and yet, in that very case *Judge Waddill* held the *Tug Britannia* which was the overtaken vessel in fault and said:

> "Upon the testimony it even seems quite certain that the Brittannia should not have given assent to the port passage in the position in which the two vessels were at the time, and when as she claimed the Baltimore had run up

on her without previous knowledge of her presence."

In *Atlas Transportation Company v. Lee Line Steamers,* 235 Fed. 492, quoted by petitioner in his brief, pages 14-15. The Circuit Court of Appeals of the 8th Circuit, said page 495:

> "Under these rules the Josh Cook had the right and the duty to hold her course. It was not its duty to keep away from the Rees Lee unless a collision should become imminent. The Rees Lee had the right to pass the other boat, if it could do so with safety to both. It had to be its own judge as to the matter of safety, as whatever risk attended its passage from the narrowness of channel, the shallowness of water, the current, suction or other causes, except the fault of the Josh Cook, was assumed by the Rees Lee. The reply of the Josh Cook to the passing signal of the Rees Lee was no more than an assent to it, at the risk of the vessel proposing it. It expressed an understanding of what the Rees Lee proposed to do, and an agreement not to thwart it; but the success of the maneuver was at the risk of the Rees Lee."

The Court there held that the overtaking vessel could not be held for the fault of the overtaken vessel and that the overtaken vessel's assent to the passing signals expressed an understanding of what the overtaking vessel proposed to do and the overtaken vessel agreed not to thwart that maneuver.

It is to be noted in this connection that that Court found page 496:

> "The witnesses agree that as soon as the passing signal had been given the Josh Cook

yielded some of the channel to the passing boat, by taking a course slightly further east than the one it had pursued and was entitled to hold."

The facts in this latter case are not analogous to the case at bar because the overtaking vessel in that case while running at fast speed ran into shoal water and sheered across the channel and into collision.

Nor is the case of *The Thoroughfare* decided by this *Court*, 48 *Supreme Ct.* 511, analogous to the case at bar because there was no overtaking situation there.

On page 16 of petitioner's brief it is stated that the sole defense pleaded and urged at the trial and upon argument to the Circuit Court of Appeals, was that immediately preceding the collision the "TAURUS" failed to maintain her course and speed but sheered to starboard so that the scows in her tow were carried to starboard and across the course of the "GULFTRADE." This is a clear mistake. By reference to Article 15, of the answer of Independent Pier Co., Record 21, it will be observed that the third and fourth charges of fault made against the "TAURUS" are:

"3. In that she failed to adhere to the passing signals which were exchanged between the two flotillas.

4. In that she failed to hold her course so that the 'GULFTRADE' with her tugs could pass saefly to the eastward of said tug and the scows which she had in tow."

And also by reference to Article 14 of the answer of the Gulf Refining Co. charges of fault, three, four and five, viz:

"3. In that she failed to navigate in accordance with whistle signals exchanged with the 'GULFTRADE.'

4. In that she unnecessarily and unduly crowded upon the course of the 'GULFTRADE.'

5. In that she failed to keep her tow tailing properly behind her." (R. 28.)

All of these faults were asserted at the trial, discussed and argued before the District Court, and were argued before the Circuit Court of Appeals. In fact the ninth assignment of error on behalf of the Independent Pier Co. (Record 558) and the twelfth assignment of error on behalf of the Gulf Refining Co. (Record 566-567), allege error in the District Court in failing to find that the "TAURUS" did not keep her tow tailing properly behind her after consenting to the passing of the "GULFTRADE."

It is true that both Courts determined against the charge that the "TAURUS" and her tow *sheered* but at the same time they also both found that the "TAURUS" *failed to keep her tow tailing properly behind her and that said tow did swing into mid-channel and athwart the channel.* And as before mentioned the Circuit Court of Appeals condemned the "TAURUS" for assenting to the passing of the "GULFTRADE" under such a condition of her tow (R. 581).

Whether the "TAURUS" and her tow sheered or swung across the "GULFTRADE'S" course, in view of the passing signals, makes no legal difference, in either case the "TAURUS" violated her duty under the passing signals, and this sheer or swing, whichever this Court determines it to be, was the sole cause of the collision.

Point II.

That the tug "Triton" should not be held liable in rem for the negligence of her master who was on the bridge of the "Gulftrade" in charge of that steamer's navigation.

The District Court, in its opinion, under the heading of conclusions of law, Record, 551, held:

> "It will be noticed that the steamship, the piloting tugs and the owners of the latter have been all made respondents. Assuming the negligence of the steamship, there is no doubt of her responsibility, as she did the damage. We make the fact finding that the tug owners (through their servants, the masters of the piloting tugs) were the navigators of the steamship whose negligence, in which all the individual respondents participated, was the proximate cause of the damage done. We conclude from this the liability of such owners. The remaining question is the responsibility of the tug respondents in *rem*. The fact finding is made that up to the point of time when the collision was imminent the tugs themselves had no part in the movement of the steamship. She was moved by her own power and was towing the tugs. All the tugs did was done in the effort to lessen the consequences of the collision and in no sense was a contributing cause.
>
> The conclusion reached is that the tugs are not answerable in damages and that the libel as against them should be dismissed without costs."

This conclusion is fully supported by the testimony. After the "TRITON" came alongside the "GULFTRADE," Quillen, her master, went up on the bridge of the "GULFTRADE," and Hearn, the "TRITON'S" pilot, went into the pilot house and took charge of that tug (R. 229). After the tugs had been made fast to the steamer and the flotilla was proceeding up the river, the "TRITON'S" engines were not in motion, but the propelling power of the flotilla was furnished by the engines of the "GULFTRADE" (R. 230).

The only order to the "TRITON" was given immediately before the collision by Quillen, who was on the bridge of the "GULFTRADE" at the time, and this order was, "Come ahead full speed and hardaport." This order was obeyed (R. 235).

At the time the order was given the "TRITON'S" engines were stopped; the purpose of the order was to sheer the "GULFTRADE" to her starboard, but immediately after the order was given the collision occurred (R. 235).

The basis for the imposition of a legal liability in *rem* in a collision case is that, according to the admiralty law, the collision impresses upon the wrongdoing vessel a maritime lien. *The China v. Walsh,* 7 Wallace 53, 19th Law Ed. 67, 73.

The "TRITON" cannot be held liable in *rem* unless she did some negligent act or acts, or negligently omitted to do something which she was required to do.

In the *Sarnia,* 261 Fed. 900, the tugs Palmer and Dalzell were assisting the steamer Sarnia into her berth. The master of the tug Palmer was on the Sarnia's bridge and in charge of the operation. While the steamer was warping into the slip, she came into collision with the barge. The District Court held the tug Palmer liable in *rem,* but the

Circuit Court of Appeals reversed that decision and said, by JUDGE HOUGH, page 901:

> "The form of this decree is wrong. The tug Palmer committed no fault and when Barrett furnished the Sarnia with a pilot in the person of Capt. Slauer he did not thereby promise a maritime lien on his tug for whatever errors Capt. Slauer might commit while standing on the Sarnia's bridge, and managing that steamer with her own steam. The Palmer was as innocent as the Dalzell, and for the same reason."

It is to be noted, from the report that Mr. Chauncey I. Clark, of counsel for the "GULFTRADE" and her owner in this case, appeared for the appellant, Barrett, owner of the tug Palmer, the appellant in the Sarnia case.

In the *Procida,* 278 Fed. 895, the Steamship Procida was being shifted by the tugs Timmons, Murray, and McCaldin Brothers, and, during the operation, she was brought into collision with another vessel. The Procida was not operating under her own motive power but was being towed by these tugs. Edward M. Timmons had contracted with the agent of the owner of the Procida to remove her from the Erie Basin to the north side of Pier 74, North River, New York City.

The owner of the Procida sued Timmons in *personam,* on his contract to furnish the tug and do the work properly, and also sued the tugs in *rem* in tort. The District Court held Timmons liable in *personam* for the negligence of Keene, the master of the tug John J. Timmons, who was in charge of the operation and also held the tug Murray in *rem* for negligence, and exonerated the tug Timmons and the tug McCaldin Brothers. On appeal, Judge Hough held that Timmons' liability in *personam* was to be de-

termined upon principles of agency, and that, since he undertook to do the job, by Capt. Keene, his agent or servant, that he, Timmons, was responsible in *personam* as principal for Keene's negligence, and said, page 898:

> "Timmons' liability as asserted, permits no application of the doctrine of marine tort; nor did he, by the mere act of agreeing to move the Procida, create a conventional maritime lien for non-performance or mal-performance in respect of the tugs furnished: The Sarnia (C. C. A.) 261 Fed. 900. This does not mean that any towing or helper tug might not be obliged to respond; but the proximate reason for such response would be its own wrongdoing, and not an owner's contract. This is no more than the familiar doctrine of towers liability which always depends upon that lack of care under the circumstances, which is negligence."

The cases of *The Gallia,* 196, Fed. 509, and the *Mexpet,* quoted on page 19 of the brief for the "GULFTRADE" and her owner, were both cases decided by the District Court for the Southern District of New York, and their conclusions in holding the tugs in *rem,* where, there was no evidence of any fault upon the tugs, stands reversed by the decisions of the Circuit Court of Appeals of the Second Circuit in the cases of The Sarnia and The Procida, *supra.*

It is to be noted that the petitioner, in its brief, neither under the heading of questions of law, on page 8 thereof, nor under the heading of specifications of errors relied upon, page 9, makes any charge of error against either the District Court or the Circuit Court of Appeals for exonerating the "TRITON in *rem.*

While the "GULFTRADE's" flotilla was proceeding up the river and until immediately before the collision, the "TRITON" was being towed by the "GULFTRADE" alongside, and she was dependent on the "GULFTRADE," not only for her motive power but for the direction of her course. The "TRITON" was, in fact, for the time being, a part of the "GULFTRADE."

The tugs "TRITON," the "CHURCHMAN" and the "GULFTRADE" must be considered as one vessel. 11 *Corpus Juris*, 1071; *The M. E. Luckenback*, 173 Fed. 155; *The American Steamship Co. v. American Steel Barge Co.*, 129 Fed. 65.

The Umbria, 153 Fed. 851;
The Gladys, 155 Fed. 653.

In other words, the whole flotilla was under the general charge of Quillen, yet Quillen had personal charge only of the "GULFTRADE," while the "TRITON" was under the charge of Hearn, her mate (R. 229).

Point III.

The Circuit Court of Appeals erred in not completely reversing the decree of the District Court and in not holding the "Taurus" solely at fault for the collision.

Since both the District and Circuit Court of Appeals have found, and the evidence in the record overwhelmingly establishes the swing or sheer of the "TAURUS" and her tow to her starboard, and across the channel after passing whistles had been exchanged, and the "GULFTRADE" was proceeding to pass the "TAURUS" and her tow, and since this

swing or sheer brought about the collision, then the "TAURUS" should be held solely in fault for the collision.

A further fact which absolutely proves that this swing on the part of the tow actually occurred is that the *first impact of the collision was between the bluff of the* "GULFTRADE'S" *port bow and the starboard side of No. 33.* The No. 33 was the starboard scow of the rear tier (R. 97, 74, 51, 137, 138). The testimony here quoted all comes from the petitioner's witnesses on the tug and scows.

The fact that such was the character of the first impact of the collision proves beyond the shadow of a doubt the sheer or swing of the towed scows to their starboard, and right across the course of the "GULFTRADE." This sheer or swing was the sole cause of the collision and both the District Court and the Circuit Court of Appeals should have so determined.

CONCLUSION.

It is respectfully suggested that the decision and judgment of the Circuit Court of Appeals should be modified and the cause remanded with directions to enter a judgment and decree dismissing the libel of the Charles Warner Co., against the Independent Pier Company, respondent.

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Dated: Philadelphia, Sept. 27, 1928.